(b)(6)

U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

[redacted]

DATE: AUG 2 2 2013 OFFICE: NEBRASKA SERVICE CENTER FILE: [redacted]

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

SELF-REPRESENTED

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at http://www.uscis.gov/forms for the latest information on fee, filing location, and other requirements.** *See also* 8 C.F.R. § 103.5. **Do not file a motion directly with the AAO.**

Thank you,

Jose F
for

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center (director), denied the immigrant visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner describes itself as an on-line jewelry auction business. It seeks to permanently employ the beneficiary in the United States as a marketing manager.[1] The petitioner requests classification of the beneficiary as an advanced degree professional pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2).

At issue in this case is whether the beneficiary possesses the minimum education and experience required by the terms of the labor certification.

I. PROCEDURAL HISTORY

As required by statute, the petition is accompanied by an ETA Form 9089, Application for Permanent Employment Certification (labor certification), approved by the U.S. Department of Labor (DOL).[2] The priority date of the petition is May 17, 2012.[3]

Part H of the labor certification states that the offered position has the following minimum requirements:

H.4. Education: Master's degree in business administration.
H.5. Training: None required.
H.6. Experience in the job offered: 60 months.
H.7. Alternate field of study: None accepted.
H.8. Alternate combination of education and experience: None accepted.
H.9. Foreign educational equivalent: Accepted.
H.10. Experience in an alternate occupation: None accepted.
H.14. Specific skills or other requirements: "None."

Part J of the labor certification states that the beneficiary possesses a master's degree in business administration/international business from the [redacted] completed in 2006.

The record contains a copy of the beneficiary's Bachelor of Science degree in Business Administration: International Business from [redacted] issued in 2006. The record does not contain a copy of the beneficiary's transcripts as required by 8 C.F.R. § 204.5(k)(3)(i). It is

---

[1] The Form I-140 states that the proposed job title is "media buyer." However, the ETA 9089 states that the proffered position is a "marketing manager."

[2] *See* section 212(a)(5)(D) of the Act, 8 U.S.C. § 1182(a)(5)(D); *see also* 8 C.F.R. § 204.5(a)(2).

[3] The priority date is the date the DOL accepted the labor certification for processing. *See* 8 C.F.R. § 204.5(d).

also noted that the ETA 9089, signed under penalty of perjury by the beneficiary and petitioner on August 8, 2012, states that the beneficiary possesses a master's degree in business administration. The record does not support this claim.

Part K of the labor certification states that the beneficiary qualifies for the proffered position based on experience as a media buyer with the petitioner in California from January 15, 2007 to March 31, 2012. The record contains an experience letter from the petitioner's human resources specialist on the petitioner's letterhead stating that the company employed the beneficiary as a media buyer from January 2007 to March 2012.

The director's decision denying the petition states that the beneficiary does not have a master's degree and 60 months of experience in the proffered position, as required by the terms of the labor certification.

On appeal, counsel for the petitioner states that the beneficiary does have the required five years of experience and that "the requirement of a master's degree that was indicated in the ETA 9089 was a clerical error-that in fact, the employer only required a bachelor's degree plus five years of experience. That requirement was stated in the prevailing wage determination and the advertisements."

The petitioner's appeal is properly filed and makes a specific allegation of error in law or fact. The AAO conducts appellate review on a *de novo* basis.[4] The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.[5] A petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the director does not identify all of the grounds for denial in the initial decision.[6]

---

[4] *See* 5 U.S.C. 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's *de novo* authority has been long recognized by the federal courts. *See, e.g., Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

[5] The submission of additional evidence on appeal is allowed by the instructions to Form I-290B, Notice of Appeal or Motion, which are incorporated into the regulations by 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

[6] *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003).

II. LAW AND ANALYSIS

The Roles of the DOL and USCIS in the Immigrant Visa Process

At the outset, it is important to discuss the respective roles of the DOL and U.S. Citizenship and Immigration Services (USCIS) in the employment-based immigrant visa process. As noted above, the labor certification in this matter is certified by the DOL. The DOL's role in this process is set forth at section 212(a)(5)(A)(i) of the Act, which provides:

> Any alien who seeks to enter the United States for the purpose of performing skilled or unskilled labor is inadmissible, unless the Secretary of Labor has determined and certified to the Secretary of State and the Attorney General that-
>
> > (I) there are not sufficient workers who are able, willing, qualified (or equally qualified in the case of an alien described in clause (ii)) and available at the time of application for a visa and admission to the United States and at the place where the alien is to perform such skilled or unskilled labor, and
> >
> > (II) the employment of such alien will not adversely affect the wages and working conditions of workers in the United States similarly employed.

It is significant that none of the above inquiries assigned to the DOL, or the regulations implementing these duties under 20 C.F.R. § 656, involve a determination as to whether the position and the alien are qualified for a specific immigrant classification. This fact has not gone unnoticed by federal circuit courts:

> There is no doubt that the authority to make preference classification decisions rests with INS. The language of section 204 cannot be read otherwise. *See Castaneda-Gonzalez v. INS*, 564 F.2d 417, 429 (D.C. Cir. 1977). In turn, DOL has the authority to make the two determinations listed in section 212(a)(14).[7] *Id.* at 423. The necessary result of these two grants of authority is that section 212(a)(14) determinations are not subject to review by INS absent fraud or willful misrepresentation, but all matters relating to preference classification eligibility not expressly delegated to DOL remain within INS' authority.
>
> . . .
>
> Given the language of the Act, the totality of the legislative history, and the agencies' own interpretations of their duties under the Act, we must conclude that Congress did not intend DOL to have primary authority to make any determinations other than the two stated in section 212(a)(14). If DOL is to analyze alien qualifications, it is for

[7] Based on revisions to the Act, the current citation is section 212(a)(5)(A).

> the purpose of "matching" them with those of corresponding United States workers so that it will then be "in a position to meet the requirement of the law," namely the section 212(a)(14) determinations.

Madany v. Smith, 696 F.2d 1008, 1012-1013 (D.C. Cir. 1983). Relying in part on *Madany*, 696 F.2d at 1008, the Ninth Circuit stated:

> [I]t appears that the DOL is responsible only for determining the availability of suitable American workers for a job and the impact of alien employment upon the domestic labor market. It does not appear that the DOL's role extends to determining if the alien is qualified for the job for which he seeks sixth preference status. That determination appears to be delegated to the INS under section 204(b), 8 U.S.C. § 1154(b), as one of the determinations incident to the INS's decision whether the alien is entitled to sixth preference status.

K.R.K. Irvine, Inc. v. Landon, 699 F.2d 1006, 1008 (9th Cir. 1983). The court relied on an amicus brief from the DOL that stated the following:

> The labor certification made by the Secretary of Labor . . . pursuant to section 212(a)(14) of the [Act] is binding as to the findings of whether there are able, willing, qualified, and available United States workers for the job offered to the alien, and whether employment of the alien under the terms set by the employer would adversely affect the wages and working conditions of similarly employed United States workers. *The labor certification in no way indicates that the alien offered the certified job opportunity is qualified (or not qualified) to perform the duties of that job.*

(Emphasis added.) *Id.* at 1009. The Ninth Circuit, citing *K.R.K. Irvine, Inc.*, 699 F.2d at 1006, revisited this issue, stating:

> The Department of Labor (DOL) must certify that insufficient domestic workers are available to perform the job and that the alien's performance of the job will not adversely affect the wages and working conditions of similarly employed domestic workers. *Id.* § 212(a)(14), 8 U.S.C. § 1182(a)(14). The INS then makes its own determination of the alien's entitlement to sixth preference status. *Id.* § 204(b), 8 U.S.C. § 1154(b). *See generally K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006, 1008 9th Cir.1983).
>
> The INS, therefore, may make a de novo determination of whether the alien is in fact qualified to fill the certified job offer.

Tongatapu Woodcraft Hawaii, Ltd. v. Feldman, 736 F. 2d 1305, 1309 (9th Cir. 1984).

Therefore, it is the DOL's responsibility to determine whether there are qualified U.S. workers available to perform the offered position, and whether the employment of the beneficiary will adversely affect similarly employed U.S. workers. It is the responsibility of USCIS to determine if the beneficiary qualifies for the offered position, and whether the offered position and the beneficiary are eligible for the requested employment-based immigrant visa classification.

The Minimum Requirements of the Offered Position

The petitioner must establish that the beneficiary satisfied all of the educational, training, experience and any other requirements of the offered position by the priority date. 8 C.F.R. § 103.2(b)(1), (12). *See Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Act. Reg. Comm. 1977); *see also Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg. Comm. 1971).

In evaluating the job offer portion of the labor certification to determine the required qualifications for the position, USCIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Madany*, 696 F.2d at 1008; *K.R.K. Irvine, Inc.*, 699 F.2d at 1006; *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

Where the job requirements in a labor certification are not otherwise unambiguously prescribed, e.g., by regulation, USCIS must examine "the language of the labor certification job requirements" in order to determine what the petitioner must demonstrate about the beneficiary's qualifications. *Madany*, 696 F.2d at 1015. The only rational manner by which USCIS can be expected to interpret the meaning of terms used to describe the requirements of a job in a labor certification is to "examine the certified job offer *exactly* as it is completed by the prospective employer." *Rosedale Linden Park Company v. Smith*, 595 F. Supp. 829, 833 (D.D.C. 1984)(emphasis added). USCIS's interpretation of the job's requirements, as stated on the labor certification must involve "reading and applying *the plain language* of the [labor certification]." *Id.* at 834 (emphasis added). USCIS cannot and should not reasonably be expected to look beyond the plain language of the labor certification or otherwise attempt to divine the employer's intentions through some sort of reverse engineering of the labor certification. Even though the labor certification may be prepared with the beneficiary in mind, USCIS has an independent role in determining whether the beneficiary meets the labor certification requirements. *See Snapnames.com, Inc. v. Michael Chertoff*, 2006 WL 3491005 *7 (D. Or. Nov. 30, 2006).

In the instant case, the labor certification states that the offered position requires a master's degree in business administration and 60 months of experience in the proffered position of marketing manager. As stated above, the record establishes that the beneficiary possesses a bachelor's degree, but does not document that the beneficiary possessed a master's degree as of the priority date.

On appeal, counsel states that the master's degree requirement was a clerical error and asserts that USCIS should accept the corresponding prevailing wage determination request, which states a bachelor's degree is required for the position, as evidence of the petitioner's intent to accept a bachelor's degree. As noted above, the only rational manner by which USCIS can be expected to

interpret the meaning of terms used to describe the requirements of a job in a labor certification is to "examine the certified job offer *exactly* as it is completed by the prospective employer." *Rosedale Linden Park Company v. Smith*, 595 F. Supp. 829, 833 (D.D.C. 1984) (emphasis added). The plain langauge of the labor certification requires a master's degree. Both part H and Part J indicate that the proffered position requires a master's degree and that the beneficiary possess a master's degree. USCIS may not ignore the term of the labor certification. *See Madany*, 696 F.2d at 1008; *K.R.K. Irvine, Inc.*, 699 F.2d at 1006; *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981). Nor may a petitioner make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm'r 1988).

For the reasons explained above, the petitioner has failed to establish that the beneficiary possesses a master's degree in business administration. Therefore, the beneficiary does not possess the minimum required qualifications required by the terms of the labor certification.

In addition, the petitioner had also failed to establish that the petitioner possesses the required 60 months of experience in the proffered position. Evidence relating to qualifying experience must be in the form of a letter from a current or former employer and must include the name, address, and title of the writer, and a specific description of the duties performed by the beneficiary. 8 C.F.R. § 204.5(g)(1). If such evidence is unavailable, USCIS may consider other documentation relating to the beneficiary's experience. *Id.*

On appeal, counsel asserts that the petitioner has five years of experience and is therefore qualified for the proffered position; however, counsel does not address the nature of the beneficiary's prior experience. As noted above, the beneficiary claims to possess over five years of experience as a media buyer for the petitioner. The labor certification requires that the 60 months of experience be in the proffered position of marketing manager. When examining a detailed description of the proffered position and a detailed description of the beneficiary's prior position, the plain language of the two descriptions indicate that the positions are not one in the same. The duties of the proffered position of marketing manager include but are not limited to:

> Direct the hiring, training and performance evaluations of marketing and sales staff and oversee their daily activities; Develop pricing strategies, balancing firm objectives and customer satisfaction; Identify, develop and evaluate marketing strategy, based on knowledge of establishment objectives, market characteristics, and cost and markup factors; Evaluate the financial aspects of product development, such as budgets, expenditures, research and development appropriations, and return-0n-investment [*sic*] and profit-loss projections; Formulate, direct and coordinate marketing activities and policies to promote products and services, working with advertising and promotion managers; Negotiate contracts with vendors and distributors to manage product distribution, establishing distribution networks and developing distribution strategies; Consult with product development personnel on product specfications [*sic*] such as design, color, and packaging; Compile lists

> describing product or service offerings; Use sales forecasting as strategic planning to ensure the sale and profitability of products, lines, or services, analyzing business developments and monitoring market trends; Select products and accessories to be displayed at trade or special production shows; Confer with legal staff to resolve problems, such as copyright infringement and royalty sharing with outside producers and distributors; Coordinate and participate in promotional activities and trade shows, working with developers, advertisers, and production managers, to market products and services; Advise business and other groups on local, national and international factors effecting the buying and selling of products and services; Initiate market research studies and analyze their findings; Consult with buying personnel to gain advice regarding the types of products or services expected to be in demand; Conduct economic and commercial surveys to identify potential markets for products and services.

The beneficiary's experience as a media buyer indicates that he has experience purchasing media space, analyzing buying strategies, collecting and analyzing sales and consumer data, negotiating with media sales companies to obtain the best rates and most appropriate media spaces in print and online advertising. While some of the duties overlap, the proffered position requires 60 months of experience in a supervisory or managerial role, as is made clear by the position description. The evidence submitted regarding the beneficiary's experience does not establish that he has this required experience.

Furthermore, representations made on the certified ETA Form 9089, which is signed by both the petitioner and the beneficiary under penalty of perjury, indicate that the beneficiary's experience with the petitioner or experience in an alternate occupation cannot be used to qualify the beneficiary for the certified position.[8] Specifically, the petitioner indicates that questions J.19 and J.20, which ask about

---

[8] 20 C.F.R. § 656.17 states:

> (h) *Job duties and requirements.* (1) The job opportunity's requirements, unless adequately documented as arising from business necessity, must be those normally required for the occupation
>
> . . . . .
>
> (4)(i) Alternative experience requirements must be substantially equivalent to the primary requirements of the job opportunity for which certification is sought; and
>
> (ii) If the alien beneficiary already is employed by the employer, and the alien does not meet the primary job requirements and only potentially qualifies for the job by virtue of the employer's alternative requirements, certification will be denied unless the application states that any suitable combination of education, training, or experience is acceptable.
>
> . . .

experience in an alternate occupation, are not applicable. In response to question J.21, which asks, "Did the alien gain any of the qualifying experience with the employer in a position substantially comparable to the job opportunity requested?," the petitioner answered "no." The petitioner specifically indicates in response to question H.6 that 60 months of experience in the job offered is required and in response to

---

(i) *Actual minimum requirements.* DOL will evaluate the employer's actual minimum requirements in accordance with this paragraph (i).

(1) The job requirements, as described, must represent the employer's actual minimum requirements for the job opportunity.

(2) The employer must not have hired workers with less training or experience for jobs substantially comparable to that involved in the job opportunity.

(3) If the alien beneficiary already is employed by the employer, in considering whether the job requirements represent the employer's actual minimums, DOL will review the training and experience possessed by the alien beneficiary at the time of hiring by the employer, including as a contract employee. The employer can not require domestic worker applicants to possess training and/or experience beyond what the alien possessed at the time of hire unless:

(i) The alien gained the experience while working for the employer, including as a contract employee, in a position not substantially comparable to the position for which certification is being sought, or
(ii) The employer can demonstrate that it is no longer feasible to train a worker to qualify for the position.

(4) In evaluating whether the alien beneficiary satisfies the employer's actual minimum requirements, DOL will not consider any education or training obtained by the alien beneficiary at the employer's expense unless the employer offers similar training to domestic worker applicants.

(5) For purposes of this paragraph (i):

(i) The term "employer" means an entity with the same Federal Employer Identification Number (FEIN), provided it meets the definition of an employer at § 656.3.
(ii) A "substantially comparable" job or position means a job or position requiring performance of the same job duties more than 50 percent of the time. This requirement can be documented by furnishing position descriptions, the percentage of time spent on the various duties, organization charts, and payroll records.

question H.10 that experience in an alternate occupation is not acceptable. In general, if the answer to question J.21 is no, then the experience with the employer may be used by the beneficiary to qualify for the proffered position if the position was not substantially comparable[9] and the terms of the ETA Form 9089 at H.10 provide that applicants can qualify through an alternate occupation.

Here, the petitioner indicates in H.10 that experience in an alternate occupation is not acceptable. As the terms of the labor certification supporting the instant I-140 petition do not permit consideration of experience in an alternate occupation, and the beneficiary's experience with the petitioner was in the position offered, the experience may not be used to qualify the beneficiary for the proffered position.

On appeal, the petitioner also submits a new experience letter reiterating the duties discussed in the original letter and stating that the beneficiary is qualified for the proffered position based on his experience as a media buyer. However, the labor certification states that the minimum required experience in 60 months as a marketing manager. The record does not establish that the beneficiary possessed such experience as of the priority date. Had the petitioner intended the minimum requirements to be met through experience in an alternate occupation, the petitioner could have filled out the ETA Form 9089 to reflect such as desire. As it did not, we must adhere to the requirements of the position as they were stated on the ETA Form 9089. Therefore, the evidence in the record fails to establish that the beneficiary possessed the required experience for the offered position as of the priority date, as certified by the DOL.

The petitioner failed to establish that the beneficiary possessed the minimum requirements of the offered position set forth on the labor certification by the priority date. Accordingly, the petition must also be denied for this reason.

III. CONCLUSION

In summary, the petitioner failed to establish that the beneficiary possessed the minimum level of education and experience as required by the terms of the labor certification. The director's decision denying the petition is affirmed.

---

[9] A definition of "substantially comparable" is found at 20 C.F.R. § 656.17(i)(5):

> (5) For purposes of this paragraph (i):
>
> . . .
>
> (ii) A "substantially comparable" job or position means a job or position requiring performance of the same job duties more than 50 percent of the time. This requirement can be documented by furnishing position descriptions, the percentage of time spent on the various duties, organization charts, and payroll records.

In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

ORDER: The appeal is dismissed.